A **PERBADANAN PENGURUSAN MENARA GURNEY & ORS**

v.

B **PESURUHJAYA BANGUNAN, MAJLIS PERBANDARAN PULAU PINANG & ANOR**

HIGH COURT MALAYA, PULAU PINANG
JOHN LOUIS O'HARA J
[JUDICIAL REVIEW NO: 25-29-2010]
C 20 SEPTEMBER 2010

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Application for certiorari order to quash decision of 1st respondent - Applicants annual general meeting contrary to Strata Titles Act 1985 provisions - Whether* D *1st respondent had jurisdiction to make such decision - Strata Titles Act 1985, Sch. 2 para 9(3) - Whether decision contravened rules of natural justice - Decision based on minutes of annual general meeting - Whether oral hearing was necessary - Whether there were errors of law in 1st respondent's decisions - Whether proxy holder could be elected as council* E *member - Whether creation of two separate sub-management corporation valid - Whether proprietor of parcels entitled to more than one representative at council election - Whether applicants had locus standi to seek judicial review*

F ***LAND LAW:*** *Strata title - Management corporation - Whether 1st applicant could appoint proxy holders as chairman or council members - Whether creation of two separate sub-management corporation valid - Whether applicants should appeal to State Authority - Building and Common Property (Maintenance and Management) Act 2007, s. 41 -* G *Whether proprietor of parcels entitled to more than one representative at the council - Whether applicants had locus standi to seek judicial review*

The applicants sought for judicial review to quash the decision of the 1st respondent regarding the irregularities which occurred in the Annual General Meeting ('AGM') of the 1st applicant, who H was the Management Corporation for Menara Gurney. The 1st respondent, who had received complaints from parcel proprietors, reviewed all the relevant documents including the minutes of the AGM and decided the following: (i) the appointment of *inter alia* the 3rd and 4th applicants, who were proxy holders as the I chairman and a Council member respectively for the 1st applicant, was contrary to the Strata Titles Act 1985 ('STA') and ordered

the 2nd respondent, a proprietor of a parcel to convene an AGM to elect Council members; (ii) the creation of two separate sub-management corporation was invalid and contrary to STA; and (iii) the Employees Provident Fund ('EPF') which owned 15 parcels of land was only entitled to one representative in relation to the election of Council members. The applicants contended that the 1st respondent did not have the jurisdiction to make such decisions pursuant to s. 67A STA, whereby any dispute under the STA should be heard by a Strata Titles Board and in the absence of which, the High Court. The issues to be determined were: (i) whether the 1st respondent had jurisdiction to make the decisions; (ii) whether the 1st respondent's decisions were in contravention of the rules of natural justice *ie*, whether there was a need for an oral hearing; (iii) whether the 1st respondent had committed errors of law in its decisions; and (iv) whether the applicants had *locus standi* to seek judicial review.

Held (dismissing the application with costs):

(1) The 1st respondent was appointed by the State Authority pursuant to s. 3(1) Building and Common Property (Maintenance and Management) Act 2007 ('BCP'). The 1st respondent was empowered to authorize the 2nd respondent to convene an extraordinary general meeting if he was satisfied that the Council was not properly constituted. It would be unfair for proprietor of parcels to be without an avenue to complain especially when the complaints relate to an issue as fundamental as the formation of or the participation in the Council of the 1st applicant. The complaints were rightly received by the 1st respondent who had the jurisdiction to deal with them under para 9(3) Sch. 2 STA. (paras 12 & 13)

(2) The issues before the 1st respondent were legal in nature and it was not necessary for there to be an oral hearing by the 1st respondent before he made his decisions. The 1st respondent had acted mainly on the minutes of the AGM which were not in dispute. There was no necessity to revert to the applicants. There was no prejudice caused to the applicants as the 1st respondent had directed a fresh AGM be convened to elect new Council members. (paras 15 & 16)

(3) It was observed that the constitution of the Council should consists of a certain number of proprietors as stated in para 2 of Sch. 2 STA. However, the STA did not state that a proprietor includes a proxy. Furthermore, Sch. 2 STA clearly distinguished a proprietor from a person entitled to vote. Therefore, proxies were only entitled to vote and not entitled to be elected as members of the Council, as they were not proprietors of parcels. Therefore, the 3rd and 4th applicants were not entitled for to be elected as chairman or Council members. (para 24)

(4) The 1st respondent was correct in holding that the EPF was only entitled to appoint one representative to the Council irrespective of the number of parcels it owned. To hold otherwise, would be unfair, inequitable and unjust as it would deprive other proprietors the chance to sit at the Council. (para 25)

(5) The 1st respondent had rightly decided that the creation of two separate sub-management corporation was invalid as the provisions of STA did not allow for such creation. (para 26)

(6) Section 41 BCP provided for parties who were aggrieved by any act or decision of a Building Commissioner appointed under the BCP to appeal to the State Authority. This would include any act or decision made by the Building Commissioner under the STA or BCP. The applicants should have availed themselves to the remedy under s. 41 BCP rather than seek for judicial review. (paras 29 & 31)

(7) The 1st applicant could only act through its Council; it did not have *locus standi* to seek for judicial review. The 3rd and 4th respondents also did not have the *locus standi* as they were not proprietors but merely proxies devoid legally of any right to seek for judicial review. (para 32)

Case(s) referred to:

Council of Civil Service Unions and Others v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Lee Tat Property Management Pte Ltd v. Management Corp Strata Title No. 360 [1991] 1 MLJ 390 ***(refd)***

Management Corp Strata Title Plan No. 460 v. Goldhill Properties Pte Ltd & Ors [1991] 3 MLJ 247 ***(refd)***
Ngu Toh Tung & Ors v. Superintendent of Lands & Survey, Kuching Division, Kuching & Anor [2006] 1 CLJ 30 CA ***(refd)***
Plaza Pekeliling Management Corporation v. IGB Corporation Berhad & Anor [2001] 1 LNS 256 ***(refd)***
QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532 CA ***(refd)***
Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Legislation referred to:
Building and Common Property (Maintenance and Management) Act 2007, ss. 3(1), (2), 41
Strata Titles Act 1985, ss. 3, 4, 6(1), 39, 67A

For the applicants - M/s Ghazi & Lim
For the 1st respondent - M/s Presgrave & Matthews
For the 2nd respondent - M/s KN Lee & Assocs

Reported by Melinda Robert

JUDGMENT

John Louis O'Hara J:

Background

[1] This matter came before me as the hearing of the applicants' application for judicial review with a view to quashing, by writs of *certiorari*, the decision of the 1st respondent contained in the 1st respondent's letter dated 3 March 2010 to 2nd respondent.

[2] After considering the affidavits of the parties, their respective submissions and the law, case and statutory, I dismissed the applicants' application and they now appeal.

Facts

[3] The 1st applicant is the Management Corporation for the building known as Menara Gurney. After the 1st applicant was established on 12 November 2009, the First Annual General Meeting (AGM) of the 1st applicant was held on 15 October 2009. The 2nd applicant is a parcel owner in Gurney Tower and

A its proxy is the 3rd applicant. The 4th applicant is the proxy of Ciptaburan Sdn Bhd and the EPF. At the AGM of 15 October 2009 the 3rd applicant was elected as Chairman of the meeting, the 4th applicant, Encik Ahmad Azman and Mr. Chong Fock Cheong were elected as the Council Members of the 1st
B applicant.

[4] The AGM also approved among others, a resolution authorizing the 1st applicant to manage and maintain the building and common property and to exercise all powers and duties in
C regard to Menara Gurney, as two separate projects under two subsidiary management corporations as follows:

(a) Gurney Hotel Sub-Management Corporation; and

(b) Gurney Tower Sub-Management Corporation.

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[5] Subsequently, copies of Minutes, the approved Resolution, the Attendance list of the AGM, the List of Council Members of the 1st applicant and the audited accounts were submitted to the 1st respondent and to the Registrar of Titles, Penang through
E letters dated 3 November 2009. The Registrar of Titles, Penang then issued the Certificate of Establishment of the 1st applicant on 12 November 2009.

[6] The 1st respondent received a number of complaints from
F the parcel proprietors of the Menara Gurney office block relating to irregularities which occurred at the AGM.

[7] The 1st respondent having considered all the relevant documents including the Minutes of the AGM and the provisions of the Building and Common Property (Maintenance and
G Management) Act 2007 (Act 663) and the Strata Titles Act 1985 (Act 318) wrote to the 2nd respondent on 3 March 2010 informing that several issues that had been decided at the AGM were disputed by the Menara Gurney office block parcel owners. There had also been presented a proposal for the AGM to be
H declared invalid and a request for 1st respondent to resolve the problems relating to the Joint Management Body (JMB).

[8] In the letter the 1st respondent made the following decisions:

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(a) that the appointment of a proxy-holder as Chairman was improper and contrary to the 2nd Schedule of the Strata Titles Act 1985;

(b) that pursuant to the Strata Titles Act 1985, only parcel owners and not a proxy-holders can be elected as Council Members and that therefore, the election of the 3rd applicant, the 4th applicant, Encik Ahmad Azman and Mr. Chong Fock Cheong as Council Members was invalid;

(c) that to overcome the problem relating to the election of the Council Members, the 1st respondent was using her powers under r. 9(3) of the 2nd Schedule of the Strata Titles Act 1985 to allow 2nd respondent as owner of parcel No. 0-27-B, to convene an AGM to elect Council Members;

(d) that the creation of the Gurney Hotel Sub-Management Corporation and the Gurney Tower Sub-Management Corporation was invalid as it was contrary to the Strata Titles Act 1985 and was therefore avoided but the 1st applicant could establish two sub-committees to manage Gurney Hotel and Gurney Tower separately whereby the two sub-committees would be fully responsible to the 1st applicant; and

(e) that although the Employees Provident Fund ("EPF") owned 15 parcels, it was entitled to appoint only one representative in relation to the business of the election of the Council Members.

Applicants' Issues

[9] The applicants' raise the following issues:

(a) that the 1st respondent did not have the jurisdiction to make the said decisions;

(b) that the 1st respondent's decisions were made in contravention of the rules of natural justice, namely the right to be heard; and

(c) that the 1st respondent had committed errors of law in its decision.

Consideration And Decision

Jurisdiction

[10] The 1st respondent is appointed by the State Authority pursuant to s. 3(1) of Act 663.

[11] By virtue of s. 3(2), the 1st respondent shall have charge of the administration of Act 663 and Parts VI and VII of Act 318 and shall perform such other duties as are imposed and may exercise such powers as are conferred upon him by Act 318.

[12] It is clear that the 1st respondent is empowered to authorize the 2nd respondent to convene an Extraordinary General meeting if he is satisfied that the Council was not property constituted. This he can do under para. 9(3) of the Second Schedule of Act 318 which comes under s. 39 and therefore Part VII of Act 318. Furthermore para. 9(3) is to be read in the light of the original compliance with para. 12 and 13 by the applicants.

[13] However the applicants submit that by virtue of s. 67A of Act 318, the 1st respondent does not have jurisdiction to make the said decisions, because s. 67A provides that there should be established a Strata Titles Board to hear and determine any dispute under Act 318. The rationale of the applicants' argument was that since there was no Strata Title Board set up as yet, all disputes had to be referred straight to court. I do not subscribe to such an argument. Clearly it would be most unfair that parcel owners be without an avenue to complain especially so if their complaint relates to an issue as fundamental as the formation of or participation in the Council of the Management Corporation. Therefore it is my decision that the complaints were rightly received by the 1st respondent who had jurisdiction to deal with them under para. 9(3).

[14] In regard to the other decisions made by the 1st respondent in his letter of 3 March 2010, it is my decision that he is seised with jurisdiction by virtue of s. 3(2) of Act 663.

Natural Justice

[15] The 1st respondent made his decisions based upon para. 9(3) of the Second Schedule of Act 318 and s. 3(2) of Act 663 which provisions do not provide a hearing to an aggrieved party. The respondents submit and I accept their contention that the facts as set out in the minutes of the AGM are not in dispute. The issues before the 1st respondent were legal in nature and as such it is my decision that there was no need for there to be an actual *viva voce* oral hearing by the 1st respondent before he wrote the letter of 3 March 2010. Moreover the 1st respondent

in his letter of 3 March 2010 clearly stated that he had considered all the documents records and minutes in relation to the AGM and his decisions were only made in relation to what transpired at the AGM and nothing else. The 1st respondent in dealing with the complaint had acted mainly on the minutes of the AGM (which are not in dispute). This reiterated my finding that there was no need nor necessity to revert back to the applicants. To rule otherwise would be to read into the Acts provisions not intended nor enacted by Parliament.

[16] Neither do I find any prejudice occasioned to the applicants because 1st respondent had by his decision directed a fresh AGM be convened for the election of new Council Members. There was no bar in regard to any person who wished to contest from so contesting.

Errors Of Law

[17] It is settled law that a court exercising its supervisory function will not interfere with an administrative decision such as was made by 1st respondent unless he has shown to have committed an error of law going to his jurisdiction.

[18] Gopal Sri Ram JCA in *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748 p. 750 stated as follows:

> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But an error of law would be disclosed if the decision maker asks himself the wrong question, or takes into account irrelevant considerations, or omits to take into account relevant consideration, or if he misconstrues the terms of any relevant statute, or mis-applies or mis-state a principle of general law.
>
> Since an inferior tribunal has no jurisdiction to make an error of law, its decision will not be immunized from judicial review by an ouster clause however widely drafted.

[19] The types of errors of law that may be committed are illegality, irrationality, procedural impropriety and proportionality which necessitate curial intervention of the High Court per Lord Diplock in *Council of Civil Service Unions and Others v. Minister for the Civil Service* [1985] AC 374 @ 410.

[20] Nevertheless judicial review will only lie for errors of law for which "substantial injustice has ensued or is likely to ensue" See *Ngu Toh Tung & Ors v. Superintendent of Lands & Survey Kuching Division, Kuching & Anor* [2006] 1 CLJ 30 per Gopal Sri Ram JCA.

[21] The applicants argue that the 1st respondent erred in that he had decided that the appointment of a proxy ie, the 3rd applicant as the Chairman was not in accordance with the Second Schedule of the Strata Title Act. The applicants further argue that "person present who is entitled to vote" would include a proxy, and therefore the 1st respondent erred in deciding that only parcel proprietors and not proxies could be appointed Council Members.

[22] It is observed that the constitution of the Council as provided for in para. 2(1) of the Second Schedule of Act 318 stipulates that subject to the provisions of this paragraph and to any rules made under Act 318 the Council shall consist of not less than three and not more than 14 proprietors who shall be elected at each AGM. It is further observed that the word proprietor (and no other) is used. "Proprietor" is defined under s. 4 of the Act 318 as follows:

> "proprietor" refers to a parcel proprietor, that is to say, a person or body for the time being registered as the proprietor of a parcel, as well as to the proprietor of a provisional block, that is to say, a person or body from the time being registered as the proprietor of a provisional block unless expressly provided otherwise.

[23] According to s. 4 of Act 318, a proprietor refers to a parcel proprietor ie, a person or body for the time being registered as the proprietor of a parcel. On the other hand paras. 14, 15 and 16 of the Second Schedule of Act 318 states that a proxy is only for the purposes of voting.

[24] It is to be observed that in regard the meaning of to proprietor that neither s. 4 of Act 318 nor para. 2 of the Second Schedule of Act 318 goes on to state "proprietor as including proxy". A proprietor is therefore distinct from a person who is entitled to vote. The Second Schedule of Act 318 clearly distinguishes "proprietor" from "person entitled to vote". The applicants' reference to the phrase "person entitled to vote" in the *Lee Tat Property Management Pte Ltd v. Management Corp Strata Title No. 360* [1991] 1 MLJ 390 does not lend support to its contention

that proxies can be elected as members of the Council. Persons entitled to vote may include a proxy but such proxies not being a proprietor are not entitled to be elected as members of the Council. Hence the distinction between a "proprietor" and "a person entitled to vote". Therefore, Encik Ahmad Azman and Encik Chang Fook Cheng as proxy holders of EPF, Mr. M. Elangovan a/l Markandan as proxy holder of Ciptaburan Sdn Bhd and Encik Vincent Tan Boon Sun as proxy holder of Bondell Corporation Sdn Bhd are not entitled to be elected as Council Members, Vincent Tan Boon Sun, Ahmad Azman b. Mohammad Hashim, Chong Fock Cheong and Elangovan sitting as Chairman were all proxies. The appointment of Ahmad Azman, Chong Fock Cheong as representative were by City Associates but not the parcel owner EPF. Even if this appointment was made legally by EPF, it was at the most to attend and vote but not to sit as Council Members. As both these nominees were purportedly appointed as proxies of EPF the 1st respondent correctly pointed out in his letter that one legal proprietor is not entitled to appoint two Council Members.

[25] In addition the 1st respondent correctly held that each proprietor is only entitled to nominate one Council Member irrespective of the number of parcels he owns. In this regard although the EPF is proprietor of 15 parcels it is only legally entitled to appoint one representative to the Council. In *Management Corp Strata Title Plan No. 460 v. Goldhill Properties Pte Ltd & Ors* [1991] 3 MLJ 247, the Singapore Court decided that each subsidiary proprietor may nominate one candidate for election to Council. Although this is based on a provision in the Singapore Land Title (Strata) Act 1988, it is submitted that the same principle applies here to prevent anyone owner (regardless of number of units owned) to monopolise the Management Corporation. This would also protect the interest of the minority and ensure representation to all in the Management Corporation and would avoid absolute control or abuse of position by any proprietor. The case referred to by the applicants, ie, *Lee Tat Property Management Pte Ltd v. Management Corp Strata Title No. 360* [1991] 1 MLJ 390 relates to voting rights and not whether proxies can be elected as members of the Council. In the case of an individual proprietor (ie, natural person) regardless of the number of units he has, he is only entitled to one representative

(ie, himself) at the Council. Therefore, by analogy a proprietor which is a company or in EPF's case a statutory body is therefore only entitled to one representative. To hold otherwise would be unfair inequitable, and unjust as it would deprive other proprietors the chance to sit on the Council.

[26] It is also my finding that the 1st respondent's decision that the creation of the Gurney Hotel Sub-Management Corporation and Gurney Tower Sub-Management Corporation was invalid was a correct one for clearly Act 318 does not allow the creation of 2 Sub-Management Corporations. See s. 6(1) of Act 318. See also *Plaza Pekeliling Management Corporation v. IGB Corporation Berhad & Anor* [2001] 1 LNS 256.

[27] As such it is my ruling that the decisions of the 1st respondent in his letter are neither illegal, nor irrational and do not amount to an error of law. I would therefore decline to intervene as it is my decision that no curial intervention is necessary.

Section 41 of Act 663

[28] Be that as it may it is now my intention to address s. 41 of Act 663. Act 663 is a special and specific piece of legislation enacted by Parliament to provide for the proper maintenance and management of buildings and common property in West Malaysia and Labuan. Section 3 provides for the appointment of a Commissioner of Buildings, and s. 41 reads as follows:

> **41. Appeals to the State Authority**
>
> Any person or body aggrieved by any act or decision of the Commissioner under this Act may, within fourteen days after having been notified of the action or decision to the State Authority; and the decision of the State Authority shall be final and shall not be questioned in any Court.

[29] The words "Commissioner under this Act" means the "Building Commissioner appointed under Act 663". It is therefore my decision that the act or decision caught by s. 41 is any decision made by the Building Commissioner be it under the Act 318 or the Act 663.

[30] If it were to be drafted to exclude decisions under the Act 318, then the words "under this Act" would be placed after words "act or decision", or there would be a comma after the word "Commissioner". So therefore an appeal under s. 41 is the only avenue.

[31] There is a plethora of case law that lays down the principle which when applied to the circumstances of this case dictate that the applicants should avail itself of the remedy under s. 41 rather than go by way of judicial review. To hold otherwise would tantamount to deliberately frustrating the clear intentions of legislature which has enacted this provision at the behest of the executive. This is not just a case of s. 41 being an alternative remedy. It is clear to me that having regard to the purpose and intent of Act 663 and the specific enactment of a provision in terms of s. 41, that Parliament intended that parties who are aggrieved by any act or decision of the Commissioner, appeal to the State Authority. The case of *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532 can therefore be distinguished.

Locus Standi

[32] The decision of the 1st respondent on 3 March 2010 was that the Council of the 1st applicant was not legally and properly constituted. This had been discussed previously. Now it is my decision that the 1st applicant can only act through its Council. This therefore begs the question as to whether the 1st applicant is clothed with *locus standi* to seek judicial review in the first place. To my mind the 1st applicant is not. Neither do the 2nd and 3rd applicants have *locus standi* to seek judicial review as they are not proprietors but mere proxies devoid legally of any right to seek judicial review on behalf of their principal. If ever at all, it should be their principals who should be the ones seeking judicial review for having their proxies dethroned as Council Members.

Conclusion

[33] Having therefore regard to the above, I therefore come to the conclusion:

– that there is no want of jurisdiction, illegality irrationality or judicial impropriety in the 1st Respondent's decisions. In short there was no misdirection or error of law on his part;

A – that the Applicants being aggrieved by the decision of Building Commissioner were required by s. 41 of Act 663 to appeal to the State Authority; and

– that the applicants lacked *locus standi.*

B **Order**

[34] The applicants' application for judicial review is dismissed with costs.

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